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Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

JOSEPH A. ROSIN, Individually and as Representative of a Class,

Petitioners,

vs.

THE NEW YORK STOCK EXCHANGE, INC.,

Respondent.

JOSEPH A. ROSIN, Individually and as Representative of a Class,

Petitioners,

vs.

THE AMERICAN STOCK EXCHANGE, INC.,

Respondent.

VICTOR H. GOULDING, Individually and as Representative of a Class,

Petitioners,

vs.

THE MIDWEST STOCK EXCHANGE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Joseph A. Rosin and Victor H. Goulding, individually and as representatives of classes of public investors, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled consolidated cases on September 6, 1973, and denial of the petition for rehearing entered on November 2, 1973.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported in 484 F.2d 179 and is reprinted in the Appendix of this petition on page 1a. The order denying a petition for rehearing appears in the Appendix on page 14a. The opinion of the District Court, unreported, appears in the Appendix on page 15a. Subsequent orders of the District Court dismissing related cases against the American Stock Exchange, Inc. and Midwest Stock Exchange, in reliance upon the District Court's earlier disposition of the case against the New York Stock Exchange, appear in the Appendix on pages 26a. and 27a.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Seventh Circuit was entered September 6, 1973. A timely petition for rehearing was denied November 2, 1973, and this petition for certiorari was filed within ninety days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether rules adopted by respondent stock exchanges (hereafter called "retax rules") which require customers of member-brokers, viz., petitioners, to pay the

registration fee (tax) which Section 31 of the Securities Exchange Act levies upon respondents for the privilege of doing business are unlawful as rules which:

(a) Effect a result which is in direct conflict with the language of Section 31 imposing a license tax on stock exchanges, not investors;

(b) Are inconsistent and in direct conflict with the statutory aim, policy and purpose of Congress underlying Section 31, revealed in the legislative history of Section 31;

(c) Frustrate, evade, and defeat the legislative intent underlying Section 31, and thereby violate Section 31;

(d) Are impliedly prohibited by Section 31, construed alone and with respondents' duties under other provisions of the Exchange Act;

(e) Were adopted pursuant to no power or authority granted by the Exchange Act;

(f) Exact an arbitrary retax charge from investors without any economic need or justification for doing so;

(g) Exact retax charges from petitioners for nothing given to them in return beyond what they are entitled to get for brokerage commissions paid to respondents' members, thereby effecting a fraudulent scheme and practice, and course of business which operates as a fraud in violation of S.E.C. Rule 10b-5(1) and (3);

(h) Control and use member-brokers to aid and abet respondents' unlawful and fraudulent exactions, in violation of respondents' self-regulatory, policing and fiduciary duties to investors?

2. Whether the foregoing questions can be resolved without a judicial construction of Section 31 of the Ex-

change Act, under principles of statutory construction laid down by this Court?

3. Whether the lower courts' rejection of the legislative history of Section 31 along with this Court's principles of statutory construction resulted in erroneous decisions?

4. Whether the lower court's rejection *sub silentio* of this Court's definition of securities law fraud and this Court's recent decisions defining the scope of fraud under S.E.C. Rule 10b-5, for which private rights of action lie, was error?

5. Whether the Exchange Act and S.E.C. Rule 10b-5 provides petitioners with rights of action to redress their past and continuing payment and exposure to respondents' unlawful rules and retax charges?

6. Whether the disclosure of respondents' retax charges on petitioners' confirmations of sales automatically concludes the question of whether respondents retax rules charges violate S.E.C. Rules 10b-5(1) and (3)?

7. Whether petitioners retax overcharge fraud claim was erroneously dismissed by summary judgment upon an application of inference and opinion viewed against petitioners, contrary to decisions by this Court governing summary judgment procedure?

8. Whether the lower courts' dismissals of petitioners' lawsuits rests upon rationalizing their aversion to petitioners' claims, and not upon an application of the Exchange Act and established principles and precedents of law to the facts?

STATUTES INVOLVED

Section 31 of the Securities Exchange Act of 1934, 15 USC. §78ee, 48 Stat. 904, as amended March 17, 1944 by material in parenthesis, 58 Stat 117, provides:

Registration Fees

"Every national securities exchange shall pay to the Commission on or before March 15, of each calendar year a registration fee for the privilege of doing business as a national securities exchange during the preceding calendar year or any part thereof. Such fee shall be in an amount equal to one five-hundredths of 1 per centum of the aggregate dollar amount of the sales of securities (other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States or such securities issued or guaranteed by corporations in which the United States has a direct or an indirect interest as shall be designated for exemption from the provisions of this section by the Secretary of the Treasury) transacted on such national securities exchange during the preceding calendar year and subsequent to its registration as a national securities exchange."

Rule 10b-5 of the Securities Exchange Commission, 17 CFR 240.10b-5, provides:

Employment of Manipulative and Deceptive Devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of

the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security."

Other involved provisions of the Securities Exchange Act, to wit: Sections 2, 3, 5, 6, 10, 19, 20, 21, 27 and 32, are set forth with official citations in the Appendix starting on page 28a.

Stock Exchange Rules Involved

New York Stock Exchange Rule 440 is set forth in the Appendix at page 27a. American Stock Exchange Rule 393 is set forth on page 40a. Midwest Stock Exchange Rule 17, which is a compendium of the rules of the other stock exchanges, provides:

"The registration fee under the Securities Exchange Act of 1934 shall be charged the customer."

Additional rules of the New York and American Stock Exchanges, published by Commerce Clearing House in booklet form and filed in the record are reprints of the official New York and American Stock Exchange Guides, also published by Commerce Clearing House. They appear in the Appendix on page 41a. et seq.

Reference to Appendices Filed Below

Reference herein to the Appendix of record filed with the Court of Appeals in the case against the New York Stock Exchange is designated "A". A second Consolidated

Appendix of records in the cases against the American and Midwest Stock Exchange is designated "A2d".

STATEMENT OF THE CASE

Petitioners Rosin and Goulding are individual public investors who have sold securities on the New York Stock Exchange (hereafter, "NYSE"), the American Stock Exchange (hereafter, "Amex"), and the Midwest Stock Exchange (hereafter, "Midwest"), the respondents. Petitioners filed three individual and class actions challenging the legality of NYSE Rule 440, Amex Rule 393 and Midwest Rule 17, (hereafter, respondents' "retax rules") insofar as said rules exact allegedly unlawful and fraudulent charges from petitioners in violation of Section 31 of the Securities Exchange Act of 1934, construed alone and in *pari materia* with other statutory duties imposed upon the respondents by the Exchange Act, and in violation of S.E.C. Rule 10b-5(1) and (3). Against the NYSE only, petitioner Rosin claimed NYSE Rule 440 exacted fraudulent overcharges in violation of S.E.C. Rule 10b-5(1) and (3). Petitioners' claims invoked federal jurisdiction under Section 27 of the Exchange Act to enforce duties and liabilities of the respondents created by the Act and by rules of the S.E.C. (Appendix, 36a).

The District Court granted the NYSE's motion for summary judgment and dismissal of all claims and thereafter entered similar orders dismissing the lawsuits against Amex and Midwest, relying upon the Memorandum Opinion written in the first filed case against the NYSE. The three cases were consolidated on appeal to the Circuit Court of Appeals, Seventh Circuit, which affirmed the orders of the District Court. A petition for rehearing was denied.

Section 31 of the Exchange Act levies a fee* from stock exchanges registered under the Act "for the privilege of doing business". The fee-tax is based upon the dollar amount of securities sold annually on registered stock exchanges. The fee-tax rate is 1/500ths of one percent of the dollar volume of securities sold. It is paid to the Securities Exchange Commission (hereafter, "S.E.C.") which in turn remits such fees to the United States Treasury as general revenue. The operations of the S.E.C. are funded by an annual budget appropriation of Congress.

The Securities Exchange Act of 1934, effective July 1, 1934, was enacted to curb widespread wrongdoing by the stock exchange-member community which resulted in public investors being mulcted out of billions of dollars. (A.71-74). The preamble and Section 2 of the Act recite the objectives and necessity of subjecting the exchange-member community to federal statutory regulation. (Appendix, 28a). Section 5 makes it unlawful for any broker to use the facility of a stock exchange unless such exchange is registered under the Act. (Appendix, 31a). Section 34, 15 U.S.C. §78hh, set October 1, 1934 as the deadline for registering. Section 6 of the Act sets forth the registration procedure. (Appendix 31a).

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* Petitioners hereafter variously refer to the Section 31 fee as a "license tax", "tax," or "fee-tax" based upon its conceptual character.

The court below held, contrary to the District Court's holding that the Section 31 "registration fee" was a classic example of an excise tax for a license (Appendix, 18a), and with disregard to Congressional debate that the assessment was a tax for a license for the standing and privilege of being a registered securities exchange, and an exercise of congressional taxing power, (A.63-64, 45-50, 52-53, 56, 59-61), that Section 31 assessed a fee. (Appendix 10a).

Prior to applying for registration, the respondent NYSE determined to collect from its members the funds with which to pay the Section 31 fee-tax and to require its members in turn to collect such funds from their customers for whom they executed sales transactions on the NYSE. On September 6, 1934 the NYSE adopted a resolution and rule imposing the Section 31 fee-tax as a charge on members' sales on the exchange and directing members to collect a like sum from customers for whom such sales were made, by withholding from the sum credited to the customer's account an amount equal to the Section 31 fee-tax, i.e. one cent per $500 of securities sold, or fraction thereof. This resolution and rule did not accompany the NYSE's application for registration but was mailed to the S.E.C. on September 17, 1934, in response to the S.E.C.'s letter inquiry about the method by which the exchange contemplated collecting the Section 31 fee. On September 28, 1934 the S.E.C. entered a brief order registering the NYSE as a national securities exchange. (A. 27). This order is not an "opinion" of the S.E.C. The order of registration expressly recites the limitations of time upon which the Commission had to examine the application of the NYSE. Said order makes no reference to Section 31 of the Act or to the NYSE's resolution and rule assessing and collecting the Section 31 fee-tax from members' customers.

The NYSE rule adopted in 1934 has been continuously in force since October 1, 1934. Its modern version is NYSE Rule 440. (Appendix, 37a). Unlike the NYSE provision prescribing rates of brokerage commission which NYSE members are required to charge customers, which is incorporated in the NYSE constitution, (Appendix, 43a), Rule 440 appears as record-keeping rule. The rule requires

members to make and preserve books and records as the Exchange prescribes. Then, after reference to Section 31 of the Exchange Act, Rule 440 directs members to file monthly reports of their total sales of securities on the Exchange, upon which every reporting member "shall pay to the Exchange a sum equal to one cent for each $500 or fraction thereon" of the total aggregate dollar sales volume. The Exchange bills members on the amounts shown to be due on the reports on the next quarterly bill rendered by the Exchange. (Appendix, 38a). Rule 440, §2440H(4), requires that in transactions where the member acts for a principal, i.e., as broker for a customer, the member shall charge the account of the customer one cent for each $500 or fraction thereof represented by the transaction by withholding such charge from the sum credited to the customer on the sale. (Appendix, 38a-39a). The rule directs members to show the "charge" on customer sales confirmations as a separate item with an explanatory legend (Appendix, 39a), and NYSE members (and member organizations) customarily show the charge on customer confirmations as "Reg. Fee," "S.E.C. Fee," or "S.E.C./POST". Members of Amex and Midwest show the charge in a similar way. The brokerage commission appears as a separate item.

On September 15, 1934 the New York Curb Exchange, predecessor to respondent Amex, adopted a resolution and rule virtually identical to those adopted by the NYSE. The rule was filed with the S.E.C. on October 25, 1934, after the S.E.C. granted registration. Present day Amex Rule 393 (Appendix, 40a) is an abbreviated version of NYSE Rule 440. On September 26, 1934 the Chicago Stock Exchange, predecessor to respondent Midwest, adopted a similar resolution followed by a rule filed with the S.E.C.

after registration was granted. Midwest Rule 17 is a compendium of NYSE Rule 440 and Amex Rule 393. (Appendix, 40a). Respondents' rules adopted in 1934 contained a provision prohibiting members from assuming the retax charge laid upon customers' sales. In later years this prohibition became incorporated in a separate rule. (Appendix, 45a). Members of respondent exchanges must adhere to the exchanges' rules. (Appendix, 43a).

Respondents' rules implement their collection of the retax from investors through their members who have custody and control of customers' accounts, from which they "withhold" respondents' retax charge and later remit such withheld charges to the exchanges. Respondents' members serve as respondents' collection agents with respect to retax charges levied upon securities sales transacted by public investors, which comprise about 75% of total sales volume on respondent exchanges. As a result of this procedure respondents' Section 31 privilege tax applicable to public sales of securities are paid instead by petitioners.

The principal activity of respondent stock exchanges is to provide a marketplace for their members who buy and sell securities both as brokers for customers and as principals for their own accounts. Among the facilities which exchanges provide their members are a trading floor, communications network, and a mechanism to clear transactions and settle accounts between members. Respondent exchanges are themselves not engaged in the securities business, the brokerage business, or any business in the customary sense. They sell nothing to petitioners and have no business relationship to petitioners.

Respondents' privilege to do business as a national securities exchange has worth only to respondents' mem-

ber-brokers whose derivative privilege to use the exchanges as marketplaces in the conduct of their brokerage business, and to charge customers fixed rates of commission, depend upon the existence of the exchanges as lawfully operating institutions. Petitioners' purchases and sales of securities through respondent exchanges are transacted entirely by and through member-brokers.

Rules adopted by the respondent stock exchanges prescribe commission rate schedules which members are required to charge their customers. The same rates apply to customer purchases and sales of securities and comprehend identical services, to wit: transmission of the order to the floor of the exchange, execution of the order on the exchange, confirmation of the execution of the order to the customer, and clearance and settlement of the transaction through the facilities of the exchange. The brokerage commission comprehends payment for all services rendered in executing sales, implicit to which is the utilization of the facilities of the exchange. The additional S.E.C. fee-charge levied by the respondent exchanges on members' customers' sales gives customers nothing more than they are entitled to get for the brokerage commissions paid by them. Petitioners receive nothing for the retax-charge except their brokers' confirmations of the taking.

The expenses of operating respondent exchanges are raised through various internal charges assessed upon the exchanges' members, along with external sources of revenue consisting chiefly of listing fees and investment income. (A. 41). The rules of the NYSE grant power to its Board of Governors (now, Board of Directors) to assess sufficient dues and charges from members, and listing fees from corporations whose securities are traded, to meet the NYSE's operating expenses, including payment of the

Section 31 fee-tax, without exacting it as a charge from petitioners. Brokerage commissions and interest income provide members with major sources of income to pay whatever internal charges and dues their exchanges assess from them. During the period 1967-1970, NYSE members received over $7 billion from petitioners in brokerage commissions and interest income. During the same period the NYSE exacted $10 million from petitioners in the form of Rule 440 retax charges (A. 36-37), a sum less than the NYSE's investment income. In the period 1967-1972 the NYSE had pre-tax profits from operations exceeding $91 million. Since 1967 the retax rules of Amex and Midwest have taken over $2 million from petitioners.

Petitioners have no financial interest in the assets or internal financial affairs of respondent exchanges. The business of the respondents is the business of their member-owners. Respondents' papers and briefs filed below assert neither financial need nor necessity, nor economic justification of any kind as to why it is petitioners' business, or ought to be petitioners' obligation to pay respondents' Section 31 license tax. Respondents' documents filed with the courts below neither deny nor dispute petitioners' allegations that brokerage commissions charge by members comprehend payment in full for all services rendered in connection with sales of securities on respondent stock exchanges. Nor do said documents specify what petitioners get from respondent exchanges for the retax charge taken from them, over and above what petitioners are entitled to get for the commissions they pay to member-brokers. The retax charge exacted by respondents' rules stands undisputed and undenied as a charge taken for nothing given.

Against the NYSE, petitioners also claim that as a result of imposing a full one cent charge on the fractional part of a sale of less than a full $500 amount, and the express prohibition upon members against aggregating customer sales and applying the retax charge upon the total (NYSE Rule 440(9), Appendix, 39a), on millions of such sales transactions since 1967, NYSE members have actually collected and retained some $300,000 (in alleged "overcharges") over and above the actual amount of Section 31 tax obligation of the NYSE applicable to the aggregate sum of these sales. Respondents' papers filed in support of their motion for summary judgment neither disputed the factual basis of petitioners' claim nor set forth factual data disputing the amount of the overcharge claim.

The S.E.C. has never instituted any proceeding contesting the legality of respondents' retax rules, nor does the record disclose that the S.E.C.'s legal staff ever addressed itself to the question. The S.E.C. was advised of the proceedings below but did not intervene.

REASONS FOR GRANTING THE WRIT

I.

RESPONDENTS' RETAX RULES EFFECT A CONTINUING UNLAWFUL EXACTION OF CHARGES FROM INVESTORS WHICH CORRUPT THE PUBLIC TRUST MANDATED UPON STOCK EXCHANGES BY THE SECURITIES EXCHANGE ACT.

These are the first cases testing the legality of respondents' retax-rules charges which, since 1967, have exacted over $16 million from petitioners and currently exact about $3 million annually. Rule-charges similar to respondents are in force on the Pacific Coast, the Philadelphia-Baltimore-Washington, and Boston Stock Exchanges.

The Exchange Act represented the hope of Congress as well as investors swindled by an assortment of nefarious practices that the Act would "do away with dishonesty and give the people the benefit of honest business." (A. 61-62) In *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 366 (1962) this Court affirmed the duty of registered stock exchanges to operate under a duty of public trust and noted "how essential it is that the highest ethical standards prevail as to every aspect of the Exchange's activities." Hardly was the ink of the Exchange Act dry when the NYSE adopted a rule calculated to evade Section 31 by foisting the license tax upon the same investors it had failed to protect. The other respondents promptly followed suit.

Respondents' retax rule-charges violate not only Section 31 but breach the entire gamut of respondents' duties to investors under the Exchange Act.* When an exchange

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* Section 32 makes exchanges subject to criminal penalties for the willful violation of any provision of the Act. (Appendix, 36a). Section 6(b) imposes a duty on respon-

violates the Act and its public trust then the integrity of the marketplace is threatened, along with public confidence. Respondents' retax rule-charges not only violate Section 31 and Section 10 (via S.E.C. Rule 10b-5), and exceed respondents' powers of self-regulation, but in using members to aid and abet such unlawfulness respondents' rules make a shambles out of the Exchange Act's self-regulatory scheme and mandate upon stock exchanges to police their own and their members' compliance with the Act to protect investors. That is the graver issue in this case which warrants granting the writ. Respondents rule-charges corrupt the very essence of their public trust and duties to investors.

This corruption continues as a result of the lower courts' judicial aversion to holding respondents' rules-charges to be unlawful, and an aversion to any statutory construction that would lead to such a result. The courts below interpreted Section 31 of the Exchange Act without regard to its legislative policy and purpose, without regard to the Act's overall aim and purpose to protect investors and promote fair dealing, and without regard to the Act's self-regulatory scheme and respondents'

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* (Continued)
dents to police members to prevent their violation of the Act. (Appendix, 32a) Sections 6(d) and 19(b) impose duties to adopt rules within prescribed grants of power under standards of fair dealing and investor protection. (Appendix, 32a, 34a). Section 6(c) impliedly prohibits an exchange from adopting any rule which is inconsistent with Exchange Act and S.E.C. rules. (Appendix, 32a). Section 20 imposes a duty not to control others, i.e., members, in furtherance of conduct that violates the Act. (Appendix, 35a). Section 10 and S.E.C. Rule 10b-5 makes it unlawful for any person to perpetrate a device or scheme to defraud or a fraudulent course of business. (Appendix, 33a).

duties thereunder. The courts below recognized no duty upon respondents either to explain or justify the basis for exacting their Section 31 license tax from investors or to reconcile such exaction with respondents' duties and powers under the Act. The approach taken by the courts below was plainly to vindicate the legality of respondents' rules charges. In doing so, the courts below adopted an approach to statutory construction in direct conflict with this Court's statutory approach to a related problem in *Silver* v. *New York Stock Exchange,* 373 U.S. 341. In substituting judicial aversion for judicial construction in dealing with petitioners' statutory claims, the decisions below are in direct conflict with this Court's decisions. *Crooks* v. *Harrelson,* 282 U.S. 55, 60, and *United States* v. *American Trucking Ass'ns.,* 310 U.S. 534, 543-544. See also, *Servette, Inc.* v. *N.L.R.B.,* 310 F.2d 659, 667.

The lower courts' approach, which made the Exchange Act a stepchild to claims invoking its provisions, was in direct conflict with the well-settled rules of statutory construction that consideration must be given to the total corpus of pertinent law and policy, that all parts of a statute, if at all possible, are to be given effect, and that the details of an act should be construed in conformity with its dominant general purpose, with text read in the light of context. *Boys Markets, Inc.* v. *Retail Clerks Union, Local* 770, 398 U.S. 235, 250; *Weinberger* v. *Hynson, Wescott and Dunning, Inc.,* ..... U.S. ....., 93 S. Ct. 2469, 2494; *S.E.C.* v. *C.M. Joiner Leasing Corp.,* 320 U.S. 344, 350-351.

The court below rejected petitioners having a private right of action for a violation of Section 31 because "• • • a situation in which such a right might be implied does

not exist here." (Appendix, 9a). The lower court's citation of *J. I. Case Co.* v. *Borak*, 377 U.S. 426 as authority for denying petitioners a right of action is contrary to what *Borak, supra,* stands for. In rejecting a right of action to petitioners, the decision below is in conflict with this Court's principles governing the availability of a remedy for violation of a remedial statute carrying criminal sanctions, where the violation frustrates congressional policy and causes injury to those whom the statutory scheme is intended to protect. *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 376, 377; *Wyandotte* v. *United States*, 389 U.S. 191, 202; *Jones* v. *Mayer Co.*, 392 U.S. 409, 414; *S.E.C.* v. *National Securities, Inc.*, 393 U.S. 453, 463.

As a result of the foregoing, respondents' retax rules remain clouded in legal doubt, and such doubt will invite challenge in other circuits where an adjudication that adheres to this Court's precedents and principles of statutory construction is sure to hold respondents' retax rule-charges to be unlawful. The resultant conflict between circuits will require resolution by this Court. Meanwhile, investors will continue to have withheld from their accounts additional millions of dollars in unlawful retax charges whose recovery by way of a class action is beset by problems now posed to this Court in *Eisen* v. *Carlisle & Jacquelin, et al.*, Certiorari Granted, 94 S.Ct. 134.

Granting the writ will avert prolonged losses to investors. It will serve to vindicate the protection the Exchange Act was intended to afford investors by enforcing the imperative duties of stock exchanges to operate in compliance with the Act and to discharge their public trust. Granting the writ will enforce this Court's supervision over lower courts with respect to discharging their judicial duty to adjudicate statutory claims in compliance

with principles of statutory construction and precedents laid down by this Court.

II.

THE LOWER COURTS' CONSTRUCTION OF SECTION 31 IS IN DIRECT CONFLICT WITH VIRTUALLY THE ENTIRE BODY OF PRINCIPLES GOVERNING THE CONSTRUCTION OF STATUTES, AND AMOUNTS TO JUDICIAL LEGISLATION NULLIFYING THE LEGISLATIVE POLICY AND PURPOSE OF SECTION 31.

Petitioners' claims made it incumbent upon the lower courts to judicially construe Section 31 based upon the legislative aim, policy and purpose underlying its enactment, as the dominant factor in determining the meaning of Section 31. In failing to do so and by rejecting the legislative history of Section 31 out of hand (Appendix 10a, 18a) the lower courts' decisions are in direct conflict with those of this Court. *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 542-543; *United States* v. *C.I.O.*, 335 U.S. 106, 112-113; *Ozawa* v. *United States*, 260 U.S. 178, 194.

The best guide to congressional policy and purpose of a statute is its legislative history, if available, and if so judicial resort to that history is essential to judicial construction. *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157; *Welsh* v. *United States*, 398 U.S. 333, concurring opinion of Mr. Justice Harlan, at page 347.

That the legislative history of Section 31 is "available" is evident in the thirty-one pages of such history contained in petitioners' affidavit filed in opposition to the NYSE's motion for summary judgment. (A. 44-75). Seldom is the legislative history of any statute *as* available to a court in such authoritative detail and clarity

as to legislative policy and purpose. The legislative history of Section 31 is free from doubt as to what Congress intended. Section 31 was incorporated into the Exchange Act in furtherance of an explicit legislative policy, not merely to raise revenue.

The Congressional policy, purpose and intent of including Section 31 in the Exchange Act was to require the stock exchange-member community to pay the Government's cost of regulating them, since it was the nefarious practices and abuses of exchange members coupled with the stock exchanges' failure to curb such practices by internal policing that necessitated their being regulated by the Exchange Act (for the purpose of protecting investors), and it was only fair to assess the Government's cost of regulation upon those who occasioned the need. (A. 60, 63-64, 59, 49, 55). Under the Exchange Act, exchanges were assigned a public institutional role of self-regulators over their members' conduct. Congress well knew that members, not the exchanges, conducted all the business on stock exchanges, and that any license tax levied on exchanges would be paid indirectly by members from internal charges assessed by the exchanges.

The lower court's conclusion that, "[T] there is nothing in Section 31 of the Act relating to broker-member or brokers' customers" (Appendix, 9a), is a conclusion at war with the language of Section 31, which imposes no license tax upon investors, and with the legislative history of Section 31 designating the wrongdoers as the tax object from whom the Government's cost of regulation was intended to be taken.

Provisions in both the House bill (H.R. 9323) and Senate bill (S. 3420) regulating stock exchanges and prescribing a license tax on stock exchanges, were debated

at length without a shred of conflict or doubt as to the policy those provisions were intended to effectuate. Senator Hastings, a sponsor of S. 3420, Section 4 of which delegated authority to a regulatory commission to assess a tax on exchanges in a discretionary amount sufficient to cover *all* the Commission's expenses, expressly noted that no one on the committee protested the provision and he received from everybody the answer that that was what was intended. (A. 49). In the House, Mr. Rayburn, sponsor of H.R. 9323, Section 30 of which is substantially Section 31 of the Exchange Act, noted, "* * * I heard no representatives of the exchange complains about this fee which they would have to pay * * *." (A. 63). A House-Senate Conference Committee adopted the House bill provision as the legislative method of meeting the Government's cost of regulating stock exchanges and their members.

The lower courts' back-door construction of Section 31 grants respondents, whose misconduct occasioned the need to be regulated (A. 60), and who, along with their member-users the Exchange Act regulates and imposes a license tax upon (A. 61, 63), a power to escape and evade their Section 31 tax obligation by the expedient device of adopting rules which shift that obligation to investors, the very victims of the wrongdoers. That construction is not only incongruous and absurd,* it is in direct conflict with what Congress intended. In reaching such a constructional absurdity the decisions below are in direct

* An absurdity heightened by the fact that respondents' rules exact charges for nothing given in return, which amounts to a fraudulent scheme and course of business conduct in violation of S.E.C. Rule 10b-5. Upon no conceivable theory did Congress grant stock exchanges a power to defraud investors.

conflict with constructional principles laid down by this Court in *United States* v. *Heirs of Boisdore,* 8 How. 113, 122, 12 L.Ed. 1009; *Mastro Plastics Corp.* v. *N.L.R.B.,* 350 U.S. 270, 286; *N.L.R.B.* v. *Lion Oil Co.,* 352 U.S. 282, 288; and *Rectors, Etc. of Holy Trinity Church* v. *United States,* 143 U.S. 457, 459.

In construing Section 31 in a way that nullifies congressional policy and runs counter to goals Congress clearly intended to effectuate to protect investors, the decisions below are in conflict with principles laid down by this Court in *N.L.R.B.* v. *Plasterers' Local Union No. 79,* 404 U.S. 116, 130, and *F.T.C.* v. *Fred Meyer, Inc.,* 390 U.S. 341, 349.

As statutes go, Section 31 is a model of unambiguous and harmonious language and legislative history. In fabricating ambiguity into Section 31 the decisions below are in direct conflict with principles of construction which prohibit creating doubt or ambiguity in the language of a statute where none exists or using extrinsic tools to construe a statute when there is nothing to construe. *United States* v. *Shreveport Grain & El. Co.,* 287 U.S. 77, 83; *United States* v. *Missouri R. R. Co.,* 278 U.S. 269, 277-278; *62 Case of Jam* v. *United States,* 340 U.S. 593, 596.

In disregarding both the purpose of the Exchange Act and the legislative policy of incorporating Section 31 into the Act, the court below reduced Section 31 to a collection of words without legislative meaning or purpose. It seized upon the fact that there is nothing in the *language* of Section 31 of the Act relating to broker-members or brokers' customers (Appendix, 9a) and from such *absent language* construed Section 31 to mean that registered exchanges are not prohibited from adopting rules assess-

ing their license fee-tax from members' customers by exacting an equivalent direct charge from them. Section 31 intends no such thing. The lower courts' constructional addition to Section 31 amounts to judicial legislation of a Congressional taxing statute within a statutory scheme which distorts its entire thrust and nullifies its legislative purpose. Such constructional surgery is in conflict with decisions of this Court. *Crooks* v. *Harrelson,* 282 U.S. 55, 60; *62 Cases of Jam* v. *United States,* 340 U.S. 593, 596. As succinctly put in *United States* v. *Missouri R.R. Co.,* 278 U.S. 269, 278, "Construction may not be substituted for legislation." It was a reconstructed Section 31 that was construed by the courts below, not Section 31 as legislated by Congress.

As additional "support" for upholding the legality of respondents' retax rules-charges, the courts below analogized the charge to the practice of conventional, unregulated businesses which price their products to include their franchise taxes.* Upon the simplistic rationale that if other businesses can lawfully do it so can the respondents, the courts below decided the instant cases without ever directly construing Section 31. Apart from the spuriousness of the analogy itself, stock exchanges sell nothing to investors, the use of an extrinsic analogy constitutes a secondary aid to construction which does not control the interpretation of statutes. The use of analogy is permissible only in cases where the meaning of a statute is doubtful or obscure, i.e. ambiguous, and even then such "aid to construction" is limited to solve rather than create ambiguity. In the instant case, the courts below relied

* The "analogous" practice taken from *Lash's Products Co.* v. *United States,* 1929, 278 U.S. 175 involved an excise tax on bottlers contained in the Revenue Act of 1918.

upon a pseudo-analogy to create ambiguity in Section 31 where none existed, in direct conflict with this Court's decision in, *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.,* 257 U.S. 563, 588-589.

Through this mixed bag of constructional distortion the courts below, instead of construing Section 31 to proliferate a legislative policy, reached an unnatural, back door construction of Section 31 proliferating a policy of judicial aversion to petitioners' claims. The route taken by the courts below is in direct conflict with this Court's principle to construe statutes in a "natural way" and in light of the legislative policy and purpose. *Securities and Exchange Com'n* v. *Ralston Purina Co.,* 346 U.S. 119, 124-125; *United States* v. *An Article of Drug, Etc.,* 394 U.S. 784, 799; *United States* v. *Shreveport Grain and El. Co.,* 282 U.S. 77, 83-84. In adopting an approach aimed at defeating rather than fulfilling the legislative policy and purpose of Section 31, the decisions below are in direct conflict with this Court's definitive statement of principles governing statutory construction set forth in *United States* v. *American Trucking Ass'ns.,* 310 U.S. 534, 543-544. In ascribing a meaning to Section 31 (i.e. what it does not expressly prohibit, it authorizes), contrary to its legislative design and purpose, the decisions below are in direct conflict with principles of construction laid down in *Ozawa* v. *United States,* 260 U.S. 178, 194. In construing Section 31 contrary to the legislative mood of Congress to regulate and tax the wrongdoers in order to protect petitioner-investors, the lower courts' decisions are in conflict with *Universal Camera Corp.* v. N.L.R.B., 340 U.S. 474, 489-490.

Seldom is this Court presented with so total an emasculation of its settled principles of statutory construction

by lower courts in the Federal system. That it resulted in nullifying provisions of the Exchange Act and the protection the Act was designed to afford investors are matters of national importance warranting granting the writ.

III.

REJECTION OF PETITIONERS' S.E.C. RULE 10b-5(1), (3) FRAUD CLAIM BY THE COURTS BELOW IS IN DIRECT CONFLICT WITH RECENT DECISIONS BY THIS COURT.

Respondents neither denied nor disputed petitioners' well pleaded facts that the charges taken by respondents retax rules are charges taken from petitioners for nothing given to them. Such charges fall squarely within the definition of securities law fraud adopted by this Court in *S.E.C.* v. *Capital Gains Research Bureau*, 375 U.S. 180, 194, "• • • all acts • • • which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." The courts below refused to recognize the foregoing definition of fraud, nor in its place did they adopt any other.

Without finding or even suggesting what petitioner-investors get from respondents in consideration for the retax charges taken from them, and upon no citation of authority, the lower courts dismissed petitioners' overcharge fraud claim. The dispositive basis for the dismissal was that since the retax charges were disclosed on customers' sales confirmations they were not fraudulent. (Appendix, 11a). In this way, petitioners' claim, grounded upon the fraud of the taking itself and asserting violations of S.E.C. Rule 10b-5(1) and (3), were dismissed

for the inapposite reason that respondents were innocent of a Rule 10b-5(2) violation—a provision not even raised as an issue to the court below. In holding that respondents' innocence of an unclaimed Rule 10b-5(2) violation (false disclosure or non-disclosure) automatically disposed of petitioners' Rule 10b-5(1) and (3) claims based on the fraud taking, the courts below simply avoided adjudicating petitioners' fraud claims. Their dismissal by way of judicial avoidance and aversion was in direct conflict with this Court's decisions in *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6, 10-12, which held Section 10b-5 fraud to be applicable to any deceptive device, typical or atypical, in the sale of securities by any person, in the context that, * * * 'disregard of trust relationships by those whom the law should regard as fiduciaries, are all a single seamless web' along with manipulation, investor's ignorance and the like." That stock exchanges are fiduciaries, that respondents' retax rules play upon investors' ignorance of the unlawfulness and non-justification of the retax charge, and that the integrity of the marketplace is the primary objective served by Rule 10b-5, all of these matters were ignored by the courts below. Also ignored, was this Court's expanded definition of Rule 10b-5 fraud to mean "any fraud" to effectuate the rule's remedial purpose to prevent fraud. *Affiliated Use Citizens of Utah* v. *United States*, 406 U.S. 128, 151. Insofar as respondents' retax rules exact both an unlawful charge and a charge for nothing by fiduciaries entrusted with maintaining the integrity of the marketplace, petitioners' right of action to redress the fraud four-square within the purpose of Rule 10b-5. The lower courts' dismissal of petitioners' fraud claims are in direct conflict with this Court's aforecited decisions.

The instant case involves not "any fraud" or an isolated fraud but a continuing fraud upon the entire investing public, a corrosive brand of fraud that eats away the core of respondents' fiduciary duties and trust relashionship toward investors.

IV.

THE LOWER COURTS' DISMISSAL OF PETITIONERS' OVERCHARGE FRAUD CLAIM BY SUMMARY JUDGMENT WAS IN DIRECT CONFLICT WITH DECISIONS BY THIS COURT.

Petitioners' overcharge fraud claim against the respondent NYSE is the undisputed direct result of NYSE Rule 440 which imposes the retax charges on individual customer sales transactions, upon the fractional part of such sales under $500, and which prohibits members from aggregating customers' sales and charging the retax on customers' total sales over a period of time. In the face of these rule-mandated overcharges the courts below dismissed petitioners' overcharge fraud claim on the ground that there is no feasible, practical alternative to the "present procedure". (Appendix, 11a). That the practicality and feasibility of *not* exacting fraud-overcharges by a fiduciary exonerates the fraud as a matter of law invoked an unprecedented absolute defense to fraud which the courts below were wont to support with any citation of authority. That is was *not* feasible or practical to exact the retax from investors without overcharging them to boot was no more than an *ad hoc* opinion of the lower courts elevated to a fact, a "fact" which petitioners were never afforded an opportunity to dispute. Before such fact issue was made out by pleadings and before such "fact" rose to the level of an undisputed fact, if

ever it could, the lower courts interjected their opinion cast in a light adverse to the non-movant petitioners, ascribed fact to it, and granted summary judgment thereon. In proceeding in this manner the courts below misapplied summary judgment to extinguish the last vestige of petitioners' claims, in direct conflict with the Court's decisions. *Poller* v. *C.B.S.*, 368 U.S. 464, 467; *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD Z KAPLAN
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Chicago, Illinois 60602
AN 3-2950

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1972 — APRIL SESSION, 1973

No. 72-1594
JOSEPH A. ROSIN, etc.,
Plaintiffs-Appellants,
v.
THE NEW YORK STOCK EXCHANGE, INC.,
Defendant-Appellee.

No. 72-1840
JOSEPH A. ROSIN, etc.,
Plaintiffs-Appellants,
v.
THE AMERICAN STOCK EXCHANGE, INC.,
Defendant-Appellee.

No. 72-1841
VICTOR H. GOULDING, etc.,
Plaintiffs-Appellants,
v.
THE MIDWEST STOCK EXCHANGE,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 71-C-2085

WILLIAM J. BAUER, *Judge.*

ARGUED APRIL 24, 1973 — DECIDED SEPTEMBER 6, 1973

Before SWYGERT, *Chief Judge,* MOORE* and FAIRCHILD, *Circuit Judges.*

MOORE, *Circuit Judge* (sitting by designation):

* Hon. Leonard P. Moore, Senior United States Circuit Judge, United States Court of Appeals for the Second Circuit, sitting by designation.

Plaintiffs, in three cases, *Rosin* v. *The New York Stock Exchange, Inc.* (No. 72-1594), *Rosin* v. *The American Stock Exhange, Inc.* (No. 72-1840), and *Goulding* v. *The Midwest Stock Exchange* (No. 72-1841), (these cases having been consolidated for purposes of appeal), appeal from orders of the United States District Court for the Northern District of Illinois, William J. Bauer, *Judge*, granting motions for summary judgment in favor of the defendant stock exchanges and dismissing the separate actions against each exchange. (Mem. Opinion and Order, N.D.Ill., No. 71-C-2085, Apr. 17, 1972 [hereinafter, Mem. Op.]; Order, 71-C-3130, 72-C-17, June 26, 1972). Since the complaints in these cases raise similar issues, specific reference will be made only to the New York Stock Exchange (NYSE) action. This opinion, however, fully applies to the actions against the American Stock Exchange and Midwest Stock Exchange.

I.

The amended complaint against defendant NYSE alleges in substance that a charge of one five-hundredths of one percent on the aggregate dollar volume of securities transactions on that exchange, which charge is made by the broker-members of the exchanges against the individual customers on each separate sale transaction, is illegal. Plaintiff sues as an individual investor on behalf of himself and on behalf of the alleged Class of all investors who have paid this fee. (Rule 23, F.R.Civ.P).

Plaintiff's claim and argument are based primarily on Section 31 of the Securities Exchange Act of 1934 (the Act). (15 U.S.C. §78ee). This section imposes upon every national securities exchange an annual registration fee payable to the Securities and Exchange Commission (the SEC) for the privilege of doing business as such exchange.

The Act provides:

> Section 31. Every national securities exchange shall pay to the Commission on or before March 15

of each calendar year a registration fee for the privilege of doing business as a national securities exchange during the preceding calendar year or any part thereof. Such fee shall be in an amount equal to one five-hundredths of 1 per centum of the aggregate dollar amount of the sales of securities (other than securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States or such securities issued or guaranteed by corporations in which the United States has a direct or an indirect interest as shall be designated for exemption from the provisions of this section by the Secretary of Treasury) transacted on such national securities exchange during the preceding calendar year and subsequent to its registration as a national securities exchange.

15 U.S.C. §78ee.

The thrust of plaintiff's argument is that the statute reads: "Every national securities exchange shall pay to the Commission * * * [a registration fee]." Therefore, argues plaintiff, the exchange itself must bear the expense of this fee which it cannot recoup through its broker-members and their customers.

Recoupment is presently accomplished on the NYSE through Exchange Rule 440 under which the Exchange has directed its members to report their sales volume monthly and to pay to the Exchange a sum equal to one cent for each $500 or fraction thereof of the total aggregate dollar sales.[1]

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[1] New York Stock Exchange Rule 440 provides:

Books and Records

Every individual member and every member organization shall make and preserve for at least three years such books and records as the Exchange may prescribe.

Pursuant to this Rule, the Exchange has issued the following directions:

[1] (Continued)

(1) Every member, or member organization engaged in clearing or settling transactions effected upon the Exchange shall maintain a daily record of the aggregate dollar amount of the sales of securites made upon the Exchange and cleared or settled by him or it. The amount of money shall be computed upon the actual sales price, disregarding commissions, taxes or accrued interest on bonds. Blotter dates shall be used throughout. All sales of securities on the Exchange shall be included, except securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest as may be designated for exemption therefrom by the Secretary of the Treasury. Odd-lot dealers shall record both the full lots and the odd lots which they sell on the Exchange. If a member organization clears and settles a transaction for a member or member organization that in turn clears it for another principal, only the member organization settling the transactions shall include it in its record. Monthly reports (Form 120-A) of the daily totals above referred to shall be submitted to the Exchange in the manner described below.

(2) At or before 10:30 a.m. on the 10th day of each month each member or member organization required to report shall submit to the Controller's Department a report on Form 120-A showing: aggregate dollar sales volume; the Registration Fee due thereon; principal amount of bonds; number of shares of stock and number of rights to subscribe.

(3) Every such reporting member or member organization shall pay to the Exchange a sum equal to one cent for each $500 or fraction thereof of the total aggregate dollar sales volume reported monthly. The total amount payable as shown on the reports on Form 120-A submitted during the quarter will appear on the next quarterly bill as rendered by the Exchange.

[1] (Continued)

(4) With respect to all transactions which are required by these directions to be included in the foregoing report, the member, firm or corporation responsible for reporting any transaction to the Exchange shall charge to the account, as billed, for which such transaction was made the sum of one cent for each $500 or fraction thereof represented by such transaction.

Whenever the account against which such charge is made is that of a member, member firm or member corporation who is acting for a principal, such member, firm or corporation shall withhold from the sum credited to the account of such principal, as billed, an amount equal to one cent for each $500 or fraction thereof represented by the transaction made for such principal.

(5) In rendering to customers confirmations of sales made on the Exchange for their account, the charge required by these directions either shall be shown separately or be treated in the same manner as transfer taxes. In either case the confirmation shall contain an explanatory legend.

(6) Members, firms or corporations that cease the clearing or settling of security transactions shall promptly render reports for any interim period resulting from such change, and shall pay promptly any sum due under the above directions.

(7) When sales are made on the Exchange for a customer each item reported in writing to the customer must be separately used as the basis for computing the fee appertaining thereto. If the written report shows as a single item the sale of two or more lots of the same security at the same price on the same day, the fee may be computed upon the total of such lots as a unit; otherwise each sale, whether reported together with others or separately, must be independently made the basis for computing the fee relating thereto.

(8) Members, firms or corporations who settle transactions for other members, firms or corporations

[1] (Continued)

and who consequently are required to report sales on the Exchange and pay a fee thereon pursuant to paragraphs 1 and 2 above must charge the account of the member, firm or corporation for whom they act on the same basis as is prescribed above with respect to transactions made for customers. This applies also to firms and corporations carrying accounts of floor traders, specialists, and non-clearing members, firms or corporations both in New York City and elsewhere.

(9) The use of daily, weekly, or any similar totals of transactions made for a particular customer or for a particular account as a basis for computing the fee chargeable to such customer or account, whether member or non-member, is prohibited.

(10) When differences in the computation of the fee arise in good faith, such as when a firm or corporation has rendered to a customer a single report covering two or more lots of the same security at the same price, and, because of "give-ups" or otherwise, it is necessary to bill or record the transaction as two or more separate lots, or when similar differences arise between a main office and a branch office, such differences may be adjusted by those involved by mutual agreement.

American Stock Exchange Rule 393 provides:

There shall be paid to the Exchange by each member, member firm or member corporation in such manner and at such time as the Treasurer of the Exchange shall direct, the sum of one cent for each $500 or fraction thereof of the dollar volume of the sales upon the Exchange of securities (whether or not cleared by the American Stock Exchange Clearing Corporation) cleared by such member, member firm or member corporation, and any such member, member firm or member corporation required by this rule to pay any sum to the Exchange in respect to any sale upon the Exchange, shall charge and collect from the person for whom he was acting in making such transaction the sum of one cent for each $500 or

Plaintiff also alleges that NYSE Rule 440 violates SEC Rule 10b-5 (17 C.F.R. 240.10b-5) in that this charge operates as a fraud on the customers.

Plaintiff seeks damages on behalf of himself and the Class and an injunction against the NYSE restraining it from continuing the practice of charging to brokers' customers the SEC registration fee specified in Section 31.

II

Defendant NYSE moved to dismiss the complaint for failure to state a claim (Rule 12(b) (6), F.R.Civ.P.) and for summary judgment on the ground that there is no genuine issue as to any material fact. (Rule 56, F.R. Civ.P.) The motion was supported by the affidavit of the Secretary of the NYSE with exhibits annexed. From this affidavit there appear the following facts as to which there is no dispute.

On September 11, 1934, the NYSE applied for registration as a natural exchange pursuant to Section 6 of the Act. With its application the NYSE submitted copies of its constitution and rules.

Prior to this application, on September 6, 1934, the Governing Committee of the NYSE had adopted a resolution providing, upon registration with the SEC, for the payment of the Section 31 fee to the NYSE by the broker-

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[1] (Continued)

fraction thereof of the dollar amount involved in such transaction. The monies so paid to the Exchange shall be paid to the Securities and Exchange Commission as the registration fee imposed upon the Exchange by the provisions of the Securities Exchange Act of 1934.

Midwest Stock Exchange Rule 17 provides:

Registration Fee Charged the Customer

The registration fee under the Securities Exchange Act of 1934 shall be charged the customer.

members thereof and that such members "shall charge and collect from the person for whom he was acting in making such transaction the sum of one cent for each $500 or fraction thereof of the dollar amount involved in such transaction."[2] In other words, the charge was to be imposed upon the customer. This resolution was apparently not submitted to the SEC with the Exchange's original application for registration as a national securities exchange. Thereafter, in response to an SEC inquiry as to how the NYSE contemplated "collecting the registration fee required by Section 31 of the Securities Exchange Act",[3] the NYSE replied and enclosed a copy of the September 6, 1934 resolution.

Under date of September 28, 1934, the SEC registered the NYSE as a national securities exchange and reserved the privilege of revoking the registration if it should appear to the SEC that "the rules of said exchange in any aspect are not just and adequate to insure fair dealing and to protect investors * * *."[4]

III

In ruling on the motion for summary judgment, the District Court first determined that "[t]he material facts presented are uncontroverted." (Mem. Op. at 2), This conclusion is clearly correct; plaintiff bases his claim upon his conception of the legal consequences of Section 31, Rule 440, Section 10(b), and Rule 10b-5, and thus this case is one which may properly be decided by summary judgment.

The Court below then turned to the question of whether there is a private right of action under Section 31 of the

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[2] NYSE resolution of September 6, 1934. (Appendix at 22).

[3] A letter from the SEC to the President of the NYSE, dated September 15, 1934, requested a copy of any adopted Rule or an explanation of the procedure.

[4] SEC Order, September 28, 1934.

Act, *supra,* which would enable this plaintiff on behalf of himself and/or the alleged Class of customers which has paid the aliquot portion of the registration fee assessed against them, to sue the Exchange for recoupment of this charge.

The Court observed that "[t]he language of Section 31 is nothing more than a revenue-raising device" (Mem. Op. at 5); that this section "does not provide for a private right of action" *(Id.* at 4); and that a situation in which such a right might be implied does not exist here. Therefore, the Court concluded, plaintiff has no private right of action for an alleged violation of Section 31.

We agree with this decision of the District Court. There is nothing in Section 31 of the Act relating to broker-members or brokers' customers. If an exchange should fail to pay the required registration fee, the *SEC* may take whatever action it deems necessary to enforce the statute. No private right of action under Section 31 is vested in any private citizen. *Compare J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433 (1964).

IV

If plaintiff has any right at all to bring this action, that right must be based upon some allegedly unlawful imposition and collection of the registration fee from the customers. The District Court stated the question thus:

> [T]he real question presented here is whether this charge lawfully may be passed on to the customers of members without express statutory authority.
>
> Mem. Op. at 5.

Concisely stated, plaintiff's argument is that Section 31 assesses a registration fee against national stock exchanges "for the privilege of doing business." Therefore, he says, "the duty to pay for that privilege is the duty of the NYSE, not the Class" (Complaint, ¶17), and the charge may not be passed on to that Class.

In a long and convoluted argument in which he chooses to term the "registration fee" a tax, plaintiff, upon this assumption, claims that, in effect, no power was given to the Exchange by Congress to "retax" the customers. To build a foundation for his argument plaintiff resorts to such expressions as "excise tax on the stock exchanges". "excise license tax", "privilege tax", "excise privilege tax." (Brief at 26, 30). But as plaintiff concedes (Brief at 29), "The statute [Section 31] is unambiguous." The charge imposed is a registration fee, *simpliciter;* it is not a tax. Therefore, the voluminous quotation from both Senate and House debates which plaintiff sets forth serve only as an interesting reminder of the intersectional views expressed by our equally intersectional Congressional representatives made in the depths of the Depression (*circa* 1929-1939) in an effort by many to attribute our national misfortune to the financial community, principally stock exchanges. The reasons and motives of the individual members of Congress which induced them to vote for a registration fee to be imposed on stock exchanges were merged into the bill as enacted, which is, as plaintiff says, "unambiguous." (*Id.*)

Equally irrelevant are plaintiff's arguments and cases based upon his "retax" theory. There is no "tax" and there is, therefore, no attempt on the part of the NYSE to effect a "retax."

It is unnecessary for our decision here that we accept the District Court's conclusion that this case presents "a classic example of an excise tax." (Mem. Op. at 6). Nor is it necessary, in view of our conclusion that Section 31 imposes no tax, that we determine whether such a "tax may be passed on to customers in the absence of express statutory authority." (*Id.* at 5). Finally, for the same reason, we need not consider whether this charge is authorized, as defendants urge, as included under "other charges" in Section 19(b)(9) of the Act. The District

Court's decision that regardless of whether Section 31 imposes "a tax or a fee," it may be passed on indirectly or, as here, directly, is clearly correct. (*Lash's Prods. Co.* v. *United States*, 278 U.S. 175, 176 (1929)).

V.

Plaintiff also argues that defendant's rules violate SEC Rule 10b-5. This argument is based upon two theories: (1) that investors are given nothing in return for the registration fee charge; and (2) that the method of computing the charge, in effect, results in unjust enrichment of the broker-members. (Plaintiff alleges that because customers must pay on each sale of stock a fee of $0.01 for each $500 *or fraction* thereof, excess fees totaling $300,000 were collected between 1967 and 1970).

As the District Court noted: "[I]t would be virtually impossible to collect an amount identical to that of the Exchange's registration fee * * *" (Mem. Op. at 15), and that there is "no feasible alternative to the present procedure * * *." "Since all brokers' billing is handled on a per-transaction basis, it would be economically impractical, if not virtually impossible, to aggregate a customer's transactions over an extended period in order to lessen the amount of the over-collection by a few pennies per customer." (Mem. Op. at 16).

The facts clearly rebut any cause of action under Section 10(b) or Rule 10b-5. There was no fraud or misrepresentation in connection with the sale of securities. To the contrary, the charges made on each transaction are itemized and openly disclosed on the customer's confirmation slips.

To insure equal treatment of customers the NYSE imposes a uniform method of collecting the registration fee. Because the trading of customers varies from accounts having only a single isolated transaction to active trading

accounts, the NYSE has enacted Rule 369[5] which prevents individual broker-members from giving preferential treatment to customers, either by the assumption of the registration fee charges or by resort to different methods of calculation.

The method of collecting the Section 31 registration fee adopted by the NYSE does not come within any proscription of the statute, the rules relating to fraud, or the intendment thereof. Plaintiff's frequent interspersing of the word "fraudulent" does not obscure the language thereof.

VI.

Brief comment must be made regarding plaintiff's attempt to seek discovery from the SEC, the American Stock Exchange, and the Midwest Stock Exchange. This discovery was sought after the District Court had entered its Memorandum Opinion and Order in the action against the NYSE and had indicated that it intended to dispose of the American and Midwest actions in similar fashion.

By such discovery plaintiff asserts that he had hoped to establish "material facts to dispute those invented by the Court in order to arm [himself] to defend against defendants' motion for summary judgment." (Brief at

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[5] New York Stock Exchange Rule 369 provides:

Prohibited Arrangements, etc.

While not in any way limiting the meaning or effect of Section 1, Article XV of the Constitution, prohibiting rebates of commission, a member, allied member or member organization may not make any of the following arrangements, agreements or payments:

• • • •

(3) The assumption, by agreement or otherwise of any part of

• • • •

(B) any charge upon the sale of securities upon the exchange because of the registration fee imposed upon national securities exchanges by the Securities Act of 1934:

• • • •

73). In the first place, courts do not "invent" material facts: they pass upon such relevant and material facts as counsel properly present. Secondly, we are dealing not with "court-made facts", "erroneous facts dehors the record" or the "court's own invented 'facts'" (Brief at 69, 73), but with statutes and rules and plaintiff-made distortion thereof.

No deposition of the SEC or of the defendants can alter the few material facts necessary to decision here. The Court did not invoke 'judicial magic" (Brief at 77) to find no substance in plaintiff's groundless, although ingenious, theories. Such alchemy as there may be results from plaintiff's efforts to turn a registration fee into a tax.

The motions for summary judgment in favor of defendants were properly granted.

Orders affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 2, 1973.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. LEONARD P. MOORE, *Sr. Circuit Judge* *
Hon. THOMAS E. FAIRFIELD, *Circuit Judge*

JOSEPH A. ROSIN, etc.,
Plaintiff-Appellant,
No. 72-1594 vs.
THE NEW YORK STOCK EXCHANGE, INC., etc.
Defendant-Appellee.

JOSEPH A. ROSIN, as Representative of a Class, *Plaintiff-Appellant,*
No. 72-1840 vs.
THE AMERICAN STOCK EXCHANGE, INC., etc.,
Defendant-Appellee.

VICTOR H. GOULDING, as Representative of a Class,
Plaintiff-Appellant
No. 72-1841 vs.
THE MIDWEST STOCK EXCHANGE, as Unincorporated Association,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

(71 C 2085
71 C 3130
72 C 17)

On consideration of the petition for rehearing filed in the above-entitled causes,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeals be and the same is hereby denied.

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* Hon. Leonard P. Moore, Sr. Circuit Judge of the U.S. Court of Appeals for the Second Circuit is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH A. ROSIN, Individually and as Representative of a Class
Plaintiffs,

vs.

THE NEW YORK STOCK EXCHANGE INC., a New York corporation and Successor to the New York Stock Exchange, an unincorporated association,
Defendant.

No. 71 C 2085

MEMORANDUM OPINION AND ORDER

This cause comes on the motion of defendant for dismissal and for summary judgment. The action, arising under the Securities Exchange Act of 1934, 15 U.S.C. §§78a et seq. (hereinafter referred to as "Exchange Act"), involves defendant's practice of collecting from its members' customers funds with which to pay its registration fee to the Securities and Exchange Commission (hereinafter referred to as "SEC").

Plaintiff, on behalf of a class consisting of all customers of defendant's members, charges that this practice is unlawful in that it violates §§31 and 10(b) of the Exchange Act and Rule 10b-5 of the SEC. Defendant stock exchange responds with the instant motion pursuant to Rules 12 and 56, F.R.Civ.P., asserting (1) that the complaint fails to state a claim upon which relief can be granted, (2) that there is no genuine issue of material fact, and (3) that defendant is entitled to judgment as a matter of law. Since defendant's Rule 12(b)(6) motion is accompanied by an affidavit and exhibits, this Court will consider the entire motion as one for summary judgment.

The material facts presented are uncontroverted: Defendant is assessed annually, pursuant to §31 of the Exchange Act,

> a resigtration fee for the privilege of doing business as a national securities exchange. . . in an amount equal to one five-hundredths of 1 per centum [one cent per $500] of the aggregate dollar amount of the sales of securities. . . transacted on [defendant exchange] during the preceding calendar year. . . .

By its Rule 440 defendant exchange has directed each of its member-brokers to pay to defendant

> a sum equal to one cent for each $500 or fraction thereof of [its] total aggregate sales volume reported monthly [¶(3)]

and to charge to its customers' accounts

> the sum of one cent for each $500 or fraction thereof represented by [each] transaction. [¶(4)]

Plaintiff contends that this practice violates §31 of the Exchange Act since the fee is assessed only against the Exchange, asserting that defendant has been given no authority to reassess the fee against its members. Further, plaintiff points out that the per-transaction method of charging the customers' accounts results in the collection of a sum greater than the amount of defendant's liability on the registration fee. Defendant, by its Rule 440(9), not only approves of this procedure but also forbids the use of any other computing method, providing that

> [t]he use of daily, weekly, or any similar totals of transactions made for a particular customer or for a particular account as a basis for computing the [registration] fee chargeable to such customer or account is prohibited.

Finally, plaintiff argues that defendant's collection of the registration fee from customers violates §10(b) of the

Exchange Act and SEC Rule 10b-5, since customers of defendant's member-brokers are not adequately informed that the fee being collected from them is in fact an assessment against defendant exchange.

Defendant's contention that it is entitled to judgment as a matter of law is predicated on the following arguments: (1) There is no private right of action for an alleged violation of §31 of the Exchange Act; (2) Section 31 does not prohibit the practice prescribed by Rule 440 of the defendant exchange; (3) Rule 440 is authorized by §19(b)(9) of the Exchange Act, subject to review and revision by the SEC, and has been in effect since 1934 without any SEC request or order for change; and (4) Rule 440 is not violative of §10(b) of the Exchange Act or SEC Rule 10b-5.

This Court will consider first the question of whether there is a private right of action for a violation of §31 of the Exchange Act. The language of this section does not provide for a private right of action; nevertheless, courts have implied such a right where the section sued upon either proscribed nefarious conduct, *Fratt* v. *Robinson*, 403 F.2d 627 (9th Cir. 1953); *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), or required a private remedy for effecting the underlying congressional purpose, *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964).

Section 31 charges exchanges with paying a registration fee to the SEC. It neither proscribes conduct nor requires a private right of action for enforcement; in fact, it is apparent that the section is nothing more than a revenue-raising device. Plaintiff's interest in the enforcement of §31 is thus no more than that of a taxpayer; absent first amendment considerations, this has been held to be insufficient for standing to sue. *Flast* v. *Cohen*, 392 U.S. 83 (1968). Therefore, this Court holds that plaintiff has no private right of action for an alleged violation of §31 of the Exchange Act.

Even if this Court were to hold that there is a private right of action under §31, it nonetheless would feel compelled to grant defendant's motion for summary judgment as to the alleged violation of §31. While §31 prescribes a charge against exchanges payable to the SEC for the privilege of doing business as a registered exchange, it makes no mention of whether such charge may be passed on to the customer. Thus, the real question presented here is whether this charge lawfully may be passed on to the customers of members of defendant exchange without express statutory authority.

Plaintiff asserts that this charge is in fact a tax on the exchange and, as such, may not be passed on to customers. In opposition, defendant contends (1) that since §31 labels the charge a "registration fee" rather than a "tax", the charge does not constitute a tax and (2) that §31, as evidenced by congressional debates, was not intended as a tax. Although the Court is charged here with interpreting a portion of a congressional act, it is not bound to determine the intent of Congress from conflicting statements made during congressional debate; it instead will look to the language and effect of §31.

The statute specifies that the charge is "for the privilege of doing business as a national securities exchange;" however, it further provides that the amount of the charge is to be determined by the dollar volume of business transacted on the exchange. Such a levy appears to be a classic example of an excise tax, whether as a "privilege tax" on doing business or as a "transactions tax." An excise has been defined as "an impost for a license to pursue certain callings or to deal in special commodities or to exercise particular franchises," *East Ohio Gas Co.* v. *Tax Commission of Ohio,* 43 F.2d 170, 172 (S.D. Ohio 1930), as well as "every form of charge imposed by public authority on performance of act, enjoyment of privilege, or engagement in occupation," *Idaho Gold Dredging Co.* v. *Balderston,* 258 Idaho 692, 78 P.2d 105,

112 (1938). Accordingly, this Court finds that the "registration fee" provided for by §31 of the Exchange Act is an excise tax imposed on the defendant exchange.

The next question to be considered is whether this tax may be passed on to customers in the absence of express statutory authority. At the outset this Court notes (1) that defendant exchange is liable to the SEC under §31 in the amount of one cent per $500 on the aggregate dollar volume of sales on that exchange each year and (2) that no case authority has been cited for the proposition that this tax cannot be passed on to the customer.

The Court recognizes the fact that all licenses, fees, taxes, and other expenses of business are customarily passed on. In fact, it is generally accepted that all costs of doing business will be included in the ultimate price of the service or merchandise. There is even substantial authority supporting, or at least recognizing, the practice of indirectly passing on taxes: *Edye* v. *Robertson,* 112 U.S. 580 (1884); 4 Cooley, *Taxation,* §165 (4th ed. 1924). See also *Lash's Products Co.* v. *United States,* 278 U.S. 175 (1929); *Cohen* v. *Swift & Co.,* 95 F.2d 131 (7th Cir. 1938); *Heckman & Co., Inc.* v. *I. S. Dawes & Son Co., Inc.,* 12 F.2d 154 (D.C. Cir. 1926); *123 East 54th Street, Inc.* v. *United States,* 62 F. Supp. 488 (S.D.N.Y. 1945). Accordingly, if the members of defendant exchange had the power to do so, they would not be criticized for raising their brokerage charges to compensate for the registration fee which they were obliged to pay to the SEC. Thus, it is clear that the tax may be passed on indirectly, i.e., included in the price charged to the customer. Likewise, the same rationale would apply even if the §31 charge had been determined to constitute a fee instead of a tax.

The sole question remaining is whether such a tax also may be passed on directly—by listing it separately as an addition to the price—assuming that this is the practice of defendant's members. In their sales confirmation, member-brokers list the charge separately as "Reg. Fee,"

"S.E.C. Fee," or "S.E.C./POST.' Thus, pursuant to defendant exchange's directives to its members, such a notation indicates that the amount charged separately covers the SEC charge.

This charge noted on the sales confirmation sent to the customer is not a direct charge in the truest sense since (1) the customer is not told the purpose of the charge and (2) the charge is not strictly limited to that amount necessary to meet defendant's liability to the SEC. Nevertheless, since it already has been determined that such tax may be passed on indirectly, this Court for purposes of discussion will consider this practice of the member-brokers as a *direct* passing on of a tax without express statutory authority.

The distinction between directly and indirectly passing on a charge is a technical one. While the former practice is one of noting the charge of the billing, the latter is one of burying the charge in the price of the service or merchandise. There is no difference between the two with respect to the impact on the customer, for he will pay an identical amount under either procedure. Since there is no practical distinction between the two practices, a direct charge should be as lawful as an indirect charge.

A recent federal case has upheld sellers' practices of directly passing on a federal excise tax to the ultimate consumers without express statutory authority. *Ankeney* v. *The Firestone Tire & Rubber Co.*, No. 71-3084-EC (U.S.D.C. C.D. Cal. April 13, 1972). In that case a federal excise tax on tires had been levied against the manufacturers, with no express provision for passing on the tax. After the manufacturers had passed on the tax to their retailers, those retailers in turn directly passed it on to the ultimate customers.

This decision might appear distinguishable from the instant cause since plaintiffs in *Ankeney* allege that the retailers were not paying the tax they collected to the

federal government; however, this distinction is obviated by the fact that the retailers paid the federal excise tax *indirectly* through their payments to the manufacturers.

Another difference between the cases lies in the express approval of the Federal Trade Commission for the practice of passing on the federal excise tax to the customers in Ankeney. The facts of the instant case indicate the tacit approval of the SEC for defendant's exchange's Rule 440, which directs its brokers to pass on the registration fee. Such tacit approval, however, is significant, considering the close regulation of defendant exchange by the SEC. Since brokerage rates cannot be raised without the approval of the SEC and since the SEC has been aware of Rule 440 from the time of its promulgation in 1934, it is evident that the SEC has considered the practice of passing on the §31 fee in determining appropriate brokerage charges. It is apparent that if defendant's member-brokers did not *directly* pass the registration fee on to their customers they would be permitted to cover this expense by *indirectly* passing it on as part of the brokerage fee.

Thus, since either a tax or a fee may be passed on indirectly, this Court is of the opinion that either a tax or a fee may be passed on directly. For the foregoing reasons, this Court concludes that defendant exchange has not violated §31 of the Exchange Act by directing its member-brokers to collect the SEC registration fee from their customers.

Turning to defendant's assertion that its Rule 440 is authorized by §19(b)(9) of the Exchange Act, this Court notes that the pertinent portions of that section provide as follows:

> (b) The Commission [SEC] is further authorized . . . by rules or regulations or by order to alter or supplement the rules of such exchange. . . in respect of such matters as. . . (9) the fixing of reasonable rates of commission, interest, listing, and other charges; . . .

Defendant contends that because Rule 440 is a rule in respect of "other charges" as that term is used in §19(b)(9), the SEC's failure to alter or supplement it amounts to its tacit approval of the rule. This contention is without merit for two reasons.

Firstly, this Court cannot agree that the registration fee constitutes an "other charge" as that term is used in §19(b)(9). The terms listed prior to "other charges" in subsection (9)—"commission," "interest," and "listing"—represent fees which, generically, are charges for a service rendered by the broker. Since the registration fee passed on to the customer is not a charge for the broker's service, it does not constitute an "other charge" within the meaning of this section, *Inclusio unius est exclusio alterius.*

Secondly, this Court is of the opinion that the SEC's failure to alter or supplement a rule cannot be interpreted as its approval of that rule. Rather, this failure to act appears analogous to the Supreme Court's denial of certiorari, which the Court has long held "imports no expression of opinion upon the merits of the case. . . ." *United States* v. *Carver,* 260 U.S. 482, 490 (1923).

Plaintiff's final contention is that the method used to collect the SEC registration fee from the customer violates §10(b) of the Exchange Act and SEC Rule 10b-5. Section 10(b) provides that it is

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange . . . , any manipulative or deceptive device or contrivance. . . .

Rule 10b-5, implementing §10(b), states that it is unlawful

> (1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Plaintiff claims that the practice advocated by defendant's Rule 440 violates Rule 10b-5(2) by failing to disclose to customers the fact that the funds being collected from them are used to pay a charge levied against the exchange.

Defendant asserts that plaintiff lacks the requisite elements of a claim under Rule 10b-5(2) since (1) that rule imposes no duty to disclose information of which plaintiff is chargeable with knowledge, (2) the alleged omission was not of a "material fact," (3) plaintiff cannot demonstrate reliance on the alleged omission, (4) the alleged omission did not occur "in connection with the purchase or sale of any security," and (5) plaintiff has not incurred any loss by reason of the alleged omission.

"[E]veryone is charged with knowledge of the United States Statutes at Large, and their enactment gives legal notice of their contents," *Cole* v. *Railroad Retirement Board*, 289 F. 2d 65, 68 (8th Cir. 1961). Since the Exchange Act was enacted by Congress and is a matter of public record, customers are chargeable with knowledge of the provisions of that Act, including §31. Even if plaintiff were in fact unaware of the registration fee, it it the opinion of this Court that the notation on the sales confirmation is sufficient to give the customer both notice of the charge and opportunity to make inquiry as to its purpose. Thus, this Court, without further dis-

cussion of defendant's arguments, holds that the provisions of defendant's Rule 440 do not violate SEC Rule 10b-5(2).

Plaintiff further claims that the collection of the registration fee from customers pursuant to Rule 440 is a fraudulent practice violative of SEC Rule 10b-5(1) and (3). The bases for this claim are (1) that the registration fee is assessed against defendant exchange only and not against the customer (2) that defendant is unjustly enriched through its practice of overcollecting the fee from the customers.

The first ground for plaintiff's claim is obviated by this Court's conclusions, *supra,* that the practice of passing on the registration fee was not violative of the Exchange Act and that the customer was given adequate notice of the basis for the charge. Since there has been no attempt on the part of defendant exchange to withhold material information from the plaintiff, the element of fraud requisite for a claim under Rule 10b-5(1) and (3) is absent. Thus, passing this fee on to the customer does not violate Rule 10b-5(1) or (3).

Neither does the second ground for plaintiff's contention give rise to a violation of Rule 10b-5(1) or (3). The per-transaction method of collecting the registration fee from customers results in the collection of funds somewhat greater than the amount required to meet defendant's liability to the SEC under §31. Because not all transactions are in amounts which are multiples of $500, this Court notes that it would be virtually impossible to collect an amount identical to that of the exchange's registration fee—one cent per $500 of the total yearly dollar volume of transactions on the exchange. By slightly overcollecting the fee, the exchange is able to meet its liability to the SEC at little cost to the individual customer. In contrast, if defendant were to undercollect this fee, at little gain to the customer, it might be unable to meet its SEC liability without substantial contributions

from its member-brokers—which contributions would lessen their effort margain as approved by the SEC. Moreover, the amount of over collection is absorbed by the administrative expense incident to the collection of the registration fee.

Finally, no feasible alternative to the present procedure is apparent. Since all brokers' billing is handled on a per-transaction basis, it would be economically impractical, if not virtually impossible, to aggregate a customer's transactions over an extended period in order to lessen the amount of the overcollection by a few pennies per customer.

Thus, this Court finds that defendant exchange is not unjustly enriched by overcollecting the registration fee from its customers and holds that this practice is not fraudulent as to plaintiff under SEC Rule 10b-5(1) or (3).

For the reasons herein discussed, this Court is of the opinion that defendant exchange is entitled to judgment as a matter of law.

Accordingly, it is hereby adjudged, ordered and decreed that defendant's motion for summary judgment is granted.

DATED: April 17, 1972

ENTER: /s/ William J. Bauer
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSEPH A. ROSIN, as Representative of a Class,
Plaintiff,
vs.
THE AMERICAN STOCK EXCHANGE, INC., a New York Corporation and Successor to the American Stock Exchange, an unincorporated association,
Defendant.
No. 71 C 3130

ORDER

This cause coming on defendant's motion for dismissal or summary judgment and plaintiff's motions for (1) a stay of proceedings pending appeal of a related case, (2) additional discovery, (3) modification of prior Orders, and (4) additional time to oppose defendant's motion for summary judgment, and the Court having examined the motions along with supporting briefs and affidavits, being fully advised in the premises, and concluding that its prior opinion in the related case of *Joseph A. Rosin* v. *The New York Stock Exchange, Inc.*, No. 71 C 2085 is dispositive of these matters:

It Is Hereby Adjudged, Ordered And Decreed that

(1) Defendant's motion for summary judgment is granted; and

(2) Plaintiff's motions hereinabove enumerated are denied.

DATED: June 26, 1972,
As Amended by Order of
August 28, 1972.

ENTER: /s/ William J. Bauer
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

VICTOR H. GOULDING, as Representative of a Class,
Plaintiff,
vs.
THE MIDWEST STOCK EXCHANGE, an unincorporated association,
Defendant.

No. 72 C 17

ORDER

This cause coming on defendant's motion for dismissal or summary judgment and plaintiff's motions for (1) a stay of proceedings pending appeal of a related case, (2) additional discovery, (3) modification of prior Orders, and (4) additional time to oppose defendant's motion for summary judgment, and the Court having examined the motions along with supporting briefs and affidavits, being fully advised in the premises, and concluding that its prior opinion in the related case is dispositive of these matters:

It Is Hereby Adjudged, Ordered And Decreed that

(1) Defendant's motion for summary judgment is granted; and

(2) Plaintiff's motions hereinabove enumerated are denied.

DATED: June 26, 1972,
As Amended by Order of
August 28, 1972

ENTER: /s/ William J. Bauer
JUDGE

Provisions of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq., 48 Stat. 881, as amended.

PREAMBLE

To provide for the regulation of securities exchanges and of over-the-counter markets operating in interstate and foreign commerce and through the mails, to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes.

SECTION 2, 15 U.S.C. §78b

Necessity for Regulation as Provided in This Title

SECTION 2. For the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto, including transactions by officers, directors, and principal security holders, to require appropriate reports, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions:

(1) Such transactions (a) are carried on in large volume by the public generally and in large part originate outside the States in which the exchanges and over-the-counter markets are located and/or are effected by means of the mails and instrumentalities of interstate commerce; (b) constitute an important part of the current of interstate commerce; (c) involve in large part the securities of issuers engaged in interstate commerce; (d) involve the use of credit, directly affect the financing of trade, industry, and transportation in interstate commerce, and directly affect and influence the

volume of interstate commerce; and affect the national credit.

(2) The prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold, the amount of certain taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and the value of collateral for bank loans.

(3) Frequently the prices of securities on such exchanges and markets are susceptible to manipulation and control, and the dissemination of such prices gives rise to excessive speculation, resulting in sudden and unreasonable fluctuations in the prices of securities which (a) cause alternately unreasonable expansion and unreasonable contraction of the volume of credit available for trade, transportation, and industry in interstate commerce, (b) hinder the proper appraisal of the value of securities and thus prevent a fair calculation of taxes owing to the United States and to the several States by owners, buyers, and sellers of securities, and (c) prevent the fair valuation of collateral for bank loans and/or obstruct the effective operation of the national banking system and Federal Reserve System.

(4) National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges

and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.

PERTINENT PORTIONS OF SECTION 3, 15 U.S.C. §78c

Definitions and Application of Title

SECTION 3. (a) When used in this title, unless the context otherwise requires—

(1) The term "exchange" means any organization, association, or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

(2) The term "facility" when used with respect to an exchange includes its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

(3) The term "member" when used with respect to an exchange means any person who is permitted either to effect transactions on the exchange without the services of another person acting as broker, or to make use of the facilities of an exchange for transactions thereon without payment of a commission or fee or with the payment of a commission or fee which is less than that charged the general public, and includes any firm transacting a business as broker or dealer of which a

member is a partner, and any partner of any such firm.

• • •

(9) The term "person" means an individual, a corporation, a partnership, an association, a joint-stock company, a business trust, or an unincorporated organization.

PERTINENT PORTION OF SECTION 5, 15 U.S.C. §78e

Transactions on Unregistered Exchanges

SECTION 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration • • • "

PERTINENT PORTIONS OF SECTION 6, 15 U.S.C. §78f

Registration of National Securities Exchanges

SECTION 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. • • •

SECTION 10(b), 15 U.S.C. §78j(b)

Regulation of the Use of Manipulative and Deceptive Devices

SECTION 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

PERTINENT PORTION OF SECTION 19(a) AND ENTIRE SECTION 19(b), 15 U.S.C. §78s

POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this chapter or of the rules and regulations thereunder or has failed

to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

PERTINENT PORTION OF SECTION 20, 15 U.S.C. §78t

Liabilities of Controlling Persons

SECTION 20. (a) Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

(b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this title or any rule or regulation thereunder through or by means of any other person.

PERTINENT PORTION OF SECTION 21, 15 U.S.C. §78u

Investigations; Injunctions and Prosecutions of Offenses

Section 21. (e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter.

PERTINENT PORTION OF SECTION 27, 15 U.S.C. §78aa

Jurisdiction of Offenses and Suits

Section 27. The district courts of the United States, the United States District Court for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or wherever the defendant may be found. • • •

PORTION OF SECTION 32, 15 U.S.C. §78ff(a)

Penalties

Section 32 (a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or

both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Stock Exchange Rules At Issue

Pertinent Portions of Rule 440 of the New York Stock Exchange, Inc.

Rules of Board—Miscellaneous Rules and Provisions Administered by Department of Member Firms.

¶ 2440 Books and Records

Rule 440. Every individual members and every member organization shall make and preserve for at least three years such books and records as the Exchange may prescribe.

• • • •

¶ 2440H Registration Fees

• • • Supplementary Material:

Report Form 120-A

10 Statutory requirements.—Section 31 of the Securities Exchange Act of 1934 [¶ 4721] imposes upon every national securities exchange the payment of a fee of 1/500th of 1 per centum of the aggregate dollar amount of the sales of securities transacted of such exchange, except in respect of transactions in securities which are direct obligations guaranteed as to principal or interest by the United States, • • •"

The Exchange has issued the following directions:

(1) Every member, or member organization engaged in clearing or settling transactions effected upon the Ex-

change shall maintain a daily record of the aggregate dollar amount of the sales of securities made upon the Exchange and cleared or settled by him or it. The amount of money shall be computed upon the actual sales price, disregarding commissions, taxes or accrued interest on bonds. * * * All sales of securities on the Exchange shall be included, except securities which are direct obligations of or obligations guaranteed as to principal or interest by the United States, or such securities issued or guaranteed by corporations in which the United States has a direct or indirect interest * * *. * * * Monthly reports (Form 120-A) of the daily totals above referred to shall be submitted to the Exchange in the manner described below.

(2) At or before 10:30 a.m. on the 10th day of each month each member or member organization required to report shall submit to the Controller's Department a report on Form 120-A showing: aggregate dollar sales volume; the Registration Fee due thereon; principal amount of bonds; number of shares of stock and number of rights to subscribe.

(3) Every such reporting member or member organization shall pay to the Exchange a sum equal to one cent for each $500 or fraction thereof of the total aggregate dollar sales volume reported monthly. The total amount payable as shown on the reports on Form 120-A submitted during the quarter will appear on the next quarterly bill as rendered by the Exchange.

(4) With respect to all transactions which are required by these directions to be included in the foregoing report, the member, firm or corporation responsible for reporting any transaction to the Exchange shall charge to the account, as billed, for which such transaction was made the sum of one cent for each $500 or fraction thereof represented by such transaction.

Whenever the account against which such charge is made is that of a member, member firm or member cor-

poration who is acting for a principal, such member, firm or corporation shall withhold from the sum credited to the account of such principal, as billed, an amount equal to one cent for each $500 or fraction thereof represented by the transaction made for such principal.

(5) In rendering to customers confirmations of sales made on the Exchange for their account, the charge required by these directions either shall be shown separately or be treated in the same manner as transfer taxes. In either case the confirmation shall contain an explanatory legend.

(6) Members, firms or corporations that cease the clearing or settling of security transactions shall promptly render reports for any interim period resulting from such change, and shall pay promptly any sum due under the above directions.

(7) When sales are made on the Exchange for a customer each item reported in writing to the customer must be separately used as the basis for computing the fee appertaining thereto. If the written report shows as a single item the sale of two or more lots of the same security at the same price on the same day, the fee may be computed upon the total of such lots as a unit; otherwise each sale, whether reported together with others or separately, must be independently made the basis for computing the fee relating thereto.

(8) • • •

(9) The use of daily, weekly, or any similar totals of transactions made for a particular customer or for a particular account as a basis for computing the fee chargeable to such customer or account, whether member or non-member, is prohibited.

(10) • • •

Rule 393 of the American Stock Exchange, Inc.
Rules of Board—Office Matters

¶ 9423 Securities and Exchange Commission Registration Fee

Rule 393. There shall be paid to the Exchange by each member, member firm or member corporation in such manner and at such time as the Treasurer of the Exchange shall direct, the sum of one cent for each $500 or fraction thereof of the dollar volume of the sales upon the Exchange of securities (whether or not cleared by the American Stock Exchange Clearing Corporation) cleared by such member, member firm or member corporation, and any such member, member firm or member corporation required by this rule to pay any sum to the Exchange in respect to any sale upon the Exchange, shall charge and collect from the person for whom he was acting in making such transaction the sum of one cent for each $500 or fraction thereof of the dollar amount involved in such transaction. The monies so paid to the Exchange shall be paid to the Securities and Exchange Commission as the registration fee imposed upon the Exchange by the provisions of the Securities Exchange Act of 1934.

Rule 17 of the Midwest Stock Exchange

Art. XXVIII

¶ 2567 Registration Fee Charged the Customer

Rule 17. The registration fee under the Securities Exchange Act of 1934 shall be charged the customer.

Provisions in the New York Stock Exchange Constitution

Article IX

¶ 1406 Signing Constitution

SEC. 6. No person elected to membership shall be admitted to the privileges thereof until he shall have signed the Constitution of the Exchange. By such signature he pledges himself to abide by the same as the same has been or shall be from time to time amended, and by all rules adopted pursuant to the Constitution.

Article X

Dues and Fines—Charge on Net Commissions—Other Charges—Penalty for Non-payment

¶ 1451 Dues

Amount fixed by Board of Governors

SEC. 1. The dues payable by a member of the Exchange, exclusive of fines and of such other charges as may be imposed pursuant to the Constitution and of contributions under Article XVI, shall be fixed by the Board of Governors from time to time and shall not exceed One Thousand Five Hundred Dollars in any calendar year.

• • •

Allocation of dues

The dues for each quarter may be divided by the Board into two parts, one of which shall constitute the member's contribution to the current expenses of the Exchange for the quarter, as estimated by the Board, and the other of which shall constitute the member's contribution for the quarter towards the capital investment of the Exchange, which shall include advances to its subsidiaries to cover capital expenditures.

¶ 1452 Charges

On net commissions

SEC. 2. The Board of Governors may, from time to time, fix and impose a charge upon members, member firms and member corporations, measured by their respective net commissions on transactions effected on the floor of the Exchange. Except as permitted by Sections 8 and 9 of this Article, the amount of such charge with respect to any transaction shall not, in any case, exceed one per cent of the difference between the gross commission charged by the member, member firm or member corporation on account of such transaction and the commissions payable by such member, firm or corporation to other members, member firms or member corporations on account of such transaction. Such charge shall be payable at such times and shall be collected in such manner as may be determined by the Board.

On odd lot purchase or sale

The Board of Governors may, from time to time, fix and impose a charge upon members, member firms and member corporations measured by their respective odd lot purchase and sales transactions as odd lot dealers on the floor of the Exchange. Except as permitted by Sections 8 and 9 of this Article, the amount of such charge shall not exceed ⅛th of one cent per share on any odd lot purchase or sale. Such charge shall be payable at such time and shall be collected in such manner as may be determined by the Board.

¶ 1453 Other Charges or Fees

SEC. 3. In addition to the dues and charges provided for by Sections 1 and 2 of this Article, the Board of Governors may, from time to time, fix and impose other charges or fees to be paid to the Exchange by members, member firms and member corporations for the use of equipment of facilities or for particular services or prileges granted.

ARTICLE XIV

Expulsion and Supension from Membership or from Allied Membership—Disciplinary Proceedings

¶ 1656 Violation of Constitution, Rules or Resolutions—Inequitable Conduct

SEC. 6. A member, allied member, member firm, member corporation or director of a member corporation who or which shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a violation of the Constitution of the Exchange or of a violation of a rule adopted pursuant to the Constitution or of a violation of a resolution of the Board of Governors regulating the conduct or business of members, allied members, member corporations or of conduct or proceeding inconsistent with just and equitable principles of trade may, if a member, allied member, member firm or member corporation, be suspended or expelled or, if an approved person, have his approval withdrawn as the Board may determine.

¶ 1657 Violation of Securities Exchange Act of 1934

SEC. 7. A member, allied member, member firm or member corporation who or which shall be adjudged guilty, by the affirmative vote of a majority of the Governors then in office, of a wilful violation of any provisions of the Securities Exchange Act of 1934 or any rule or regulation thereunder shall be deemed to be guilty of conduct or proceeding inconsistent with just and equitable principles of trade and may be suspended or expelled as the Board of Governors may determine.

ARTICLE XV

Commissions and Service Charges

¶ 1701 Obligation To Charge or Collect Commissions

SEC. 1. Commissions shall be charged and collected upon the execution of all orders for the purchase or sale

for the account of members or allied members or of parties not members or allied members of the Exchange, of securities admitted to dealings upon the Exchange and these commissions shall be at rates not less than the rates in this Article prescribed; and shall be net and free from and rebate, return, discount or allowance made in any shape or manner, or by any method or arrangement direct or indirect. No bonus or percentage or portion of a commission, whether such commission be at or above the rates herein established, or any portion of a profit except as may be specifically permitted by the Constitution or a rule adopted by the Board of Governors, shall be given, paid or allowed, directly or indirectly, or as a salary or portion of a salary, to a clerk or person for business sought or procured for any member or allied member of the Exchange or member firm or member corporation. No member, member firm or member corporation shall, in consideration of the receipt of listed business and at the direct or indirect request of a non-member or by direct or indirect arrangement with a non-member, make any payment or give up any work or give up all or any part of any commission or other property to which such member, firm or member corporation is or will be entitled.

• • •

¶ 1702

SEC. 2. (Prescribes rates of commission applicable to transactions in stocks, rights and warrants on public (non-member) business as well as intra-member rates.)

¶ 1707 Proposition To Violate Commission Schedules

SEC. 7. No member, allied member, member firm or member corporation shall make a proposition for the transaction of business at less than the minimum rates of commission prescribed in this Article.

Portion of Rule 369 of the New York Stock Exchange, Inc.

¶ 2369 Prohibited Arrangements, etc.

Rule 369. While not in any way limiting the meaning or effect of Section 1, Article XV [¶ 1701] of the Constitution, prohibiting rebates of commission, a member, allied member or member organization may not make any of the following arrangements, agreements or payments:

Unusual interest rates or money advances

(1) An arrangement with a customer whereby special and unusual rates of interest are given or money advanced upon unusual terms for the purpose of obtaining or retaining business.

Interest on short sales

(2) An allowance of interest on short sales at more than the loan market rates for the stocks borrowed or used for such short sales.

Stamp taxes, etc.

(3) The assumption, by agreement or otherwise, of any part of

(A) Any stamp tax imposed by the United States or any State on transfers, sales, loans, or borrowings for the account of a customer;

(B) any charge upon the sale of securities upon the Exchange because of the registration fee imposed upon national securities exchanges by the Securities Act of 1934;

(C) any commission payable upon transactions in commodities or securities dealt in upon another exchange;